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# Supreme Court of the United States

OCTOBER TERM, 1987

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BURLINGTON NORTHERN RAILROAD COMPANY,
*Petitioner*,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
*Respondent*.

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | i |
| ARGUMENT | 1 |
| CONCLUSION | 10 |


TABLE OF AUTHORITIES

CASES


| | |
|---|---|
| *Airline Pilots Association International v. Alaska Airlines*, No. C87-353R (W.D. Wash. Aug. 11, 1987), *appeal docketed*, No. 87-4167 (9th Cir. Sept. 9, 1987) | 7 |
| *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern Railroad*, 802 F.2d 1016 (8th Cir. 1986) | 2, 5 |
| *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern Railroad*, 643 F. Supp. 41 (N.D. Iowa 1985), *aff'd in part and rev'd in part*, 802 F.2d 1016 (8th Cir. 1986) | 2, 3 |
| *Brotherhood of Maintenance of Way Employees v. Chicago & North Western Transportation Co.*, 827 F.2d 330 (8th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3682 (1988) | 7 |
| *Brotherhood of Railway & Steamship Clerks v. Florida East Coast Railway*, 384 U.S. 238 (1966) | 6 |
| *International Association of Machinists & Aerospace Workers, Lodge 19 v. Southern Pacific Transportation Co.*, 105 L.R.R.M. (BNA) 2046 (E.D. Cal. 1980) | 7 |
| *International Association of Machinists & Aerospace Workers v. Trans World Airlines*, 663 F. Supp. 230 (D.D.C. 1987) | 7 |
| *International Brotherhood of Teamsters, Local 19 v. Southwest Airlines*, No. 87-1085 (5th Cir. Apr. 27, 1988) | 5, 7 |

TABLE OF AUTHORITIES—Continued

Page

*Railway Labor Executives' Association v. Consolidated Rail Corp.*, No. 87-1289 (3d Cir. April 25, 1988) ..... 4, 7

*Railway Labor Executives Association v. Norfolk & Western Railway*, 833 F.2d 700 (7th Cir. 1987) ..... 5, 7

STATUTES

Railway Labor Act, 45 U.S.C. §§ 151-88 ..... *passim*

LEGISLATIVE MATERIALS

Developments in Drug and Alcohol Testing, 1988: Stenographic Hearings on S. 1041 Before the Comm. on Commerce, Science and Transportation, 100th Cong., 2d Sess. (1988) ..... 8

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The decision below has been instrumental in fostering a conflicting body of case law with respect to the treatment of employee drug testing programs under the Railway Labor Act ("RLA"). The resulting confusion has the practical effect of inhibiting two industries with critical public safety obligations—railroads and airlines—from taking effective measures against employee drug abuse. The brief in opposition ("Opp. Cert.") of respondent Brotherhood of Locomotive Engineers ("BLE") neither reconciles the conflicting lower court decisions nor diminishes the significant impact the Ninth Circuit's holding will have on all collectively-bargained relationships.

## I

BLE seeks to dispel the patent conflict between the Eighth Circuit decision [1] and this case with the bare assertion that the record before the Eighth Circuit was "far different from that before the Ninth Circuit . . . ." Opp. Cert. at 24-25. BLE's failure to offer any support for that assertion is eloquent testimony that no such differences in fact exist.

The Eighth and Ninth Circuits reviewed the same drug testing program instituted by the same railroad to enforce the same safety rule with the same history of prior enforcement. As the Iowa district judge noted: "From reviewing the [Montana] decisions, it is clear to this Court that the factual and legal issues presented in them are very similar to those now before this Court." *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern Railroad*, 642 F. Supp. 41, 44 (N.D. Iowa 1985) (*"BMWE"*), *aff'd in part and rev'd in part*, 802 F.2d 1016 (8th Cir. 1986).

The drug testing program at issue in both cases was the company-wide program established by petitioner Burlington Northern Railroad Company ("BN"); BN does not have different programs for members of different unions. BN's program was designed to implement safety Rule G, which, similarly, applies to "employees" and does not differentiate among them based on union membership. Thus, the evidence introduced in each of the two cases was not limited to any particular union or region, and the references to past practices drew no distinctions between unions.[2]

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[1] *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern Railroad*, 802 F.2d 1016 (8th Cir. 1986), Appendix ("App.") at 36a.

[2] *See, e.g.*, Ninth Circuit Opening Brief of BLE at 19 (references to past practices involving engineers, other crew members, and employees unidentified as to union or position); App. at 87a (list of employees tested prior to November 1984).

Indeed, because the district court case in the Eighth Circuit began after district court proceedings were already under way in the Ninth Circuit case, the parties in one case made their record by using testimony from the other. For example, the direct testimony and cross-examination of a BLE official in the Montana case were introduced in the Iowa district court as evidence of past practices.[3] Similarly, the key evidence describing BN's prior drug testing efforts was introduced in substantially similar form in both proceedings.[4] Given the identity of the underlying facts and the near identity of the records, it is inconceivable that the two courts could have reached different results had not conflicting legal reasoning been employed.

Analysis of the opinions confirms this point. The Eighth Circuit reasoned that, where the railroad has a past practice of sensory observance of drug or alcohol impairment, the RLA authorizes use of "more refined" testing methods to confirm drug use. App. at 49a-50a. The Ninth Circuit, on the other hand, applied two wholly different legal theories. First, it asserted that BN's prior programs were based on "particularized suspicion" and that the disputed program was based on "generalized suspicion." The difference between these two legal categorizations—which struck the district court as immaterial—was found legally dispositive by the Ninth Circuit. *Id.* at 10a. Second, the Ninth Circuit held that, in the absence of an express agreement, private employees would be presumed not to have agreed to any term of employ-

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[3] *See* Transcript of Iowa district court hearing held June 25, 1985 at 139-40 (discussing admission of Pelava Affidavit) *and BMWE*, 642 F. Supp. at 49 (admitting Pelava's Affidavit together with transcript of cross-examination).

[4] *Compare* Affidavit of Charles J. Bryan at ¶ 3, App. at 82a-83a (Montana proceedings; describing BN's Rule G past practices) *with* Affidavit of Tom C. Whitacre at ¶ 6 (Iowa proceedings; providing identical information on Rule G past practices).

ment that provides less protection for privacy interests than the Fourth Amendment. The Ninth Circuit applied this novel legal theory to avoid facts that led the Eighth Circuit to an opposite result. *Id.* at 11a.[5]

The conflict between the Ninth and Eighth Circuits is apparent to other courts. In *Railway Labor Executives' Association v. Consolidated Rail Corp.*, No. 87-1289 (3d Cir. Apr. 25, 1988), a decision rendered since the filing of this petition, the Third Circuit freely acknowledged that the legal principles underlying the decisions on RLA drug testing are hopelessly confused:

> Three other courts of appeals have considered the same or similar drug-testing issues under the RLA, with varying results and rationales.
>
> * * * *
>
> The absence of any uniformity in interpretation by the other courts reinforces our responsibility to make an independent analysis of the applicable law to the undisputed facts.

*Id.* at 11, 15.

The Third Circuit went on to conclude that Conrail's addition of a drug screen to the urinalysis portion of routine employee physical examinations represented a major dispute under the RLA.[6] The Third Circuit thereby put

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[5] That the Ninth Circuit's decision rests on that court's own legal theories is also evident from the procedural setting in which it was rendered. The Ninth Circuit reversed without holding the district court's findings of fact to be clearly erroneous, confirming that a difference in legal analysis, not the state of the record, controlled the result.

[6] The Third Circuit based its decision on a rationale not previously articulated by any other court. It looked to past practices to determine whether there had been an agreement on certain specific matters, such as the particular drug test to be used, rather than on the broader issue of drug testing itself. *Conrail*, No. 87-1289 at 18. Like the Ninth Circuit in this case, the Third Circuit reached its decision without guidance on the need to reconcile public safety issues with the requirements of the collective bargaining process.

itself into conflict with the Seventh and Eighth Circuits, which reviewed identical questions as to drug screening in such examinations. *See Railway Labor Executives Association v. Norfolk & Western Railway*, 833 F.2d 700 (7th Cir. 1987); *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern Railroad*, 802 F.2d 1016 (8th Cir. 1986), App. at 36a. The conflicts among appellate courts on even these relatively simple facts illustrates that different results with respect to employer drug testing are being driven not by facts but by philosophical differences.

Moreover, the addition of two new court of appeals decisions since the filing of the petition confirms the pressing need for guidance.[7] While giving lip service to the "arguably justified" standard under the RLA, the courts of appeals are actually developing a body of case law based on fine distinctions as to what level of suspicion justifies drug testing. Under the cover of such legal principles, lower courts are routinely disposing of issues that properly belong before arbitrators.

As the collective decisions of the courts of appeals indicate—and as at least one court of appeals has candidly acknowledged—the legal principles being applied in drug testing cases are in disarray. Even with respect to a single program, the federal courts are not reaching the same result. Moreover, the courts of appeals are just now facing what promises to be an onslaught of cases involv-

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[7] In *International Brotherhood of Teamsters, Local 19 v. Southwest Airlines*, No. 87-1085 (5th Cir. Apr. 27, 1988), after reviewing both the Eighth and Ninth Circuit decisions with respect to BN, the Fifth Circuit recently concluded that Southwest's program "includes all of the elements found to constitute 'major' disputes by the Ninth Circuit in conjunction with a less extensive history or [sic] Rule G enforcement." Slip op. at 2933. This second new decision, which was based on a misconception of the Ninth Circuit record, thus held that Southwest's implementation of a mandatory drug and alcohol testing program constituted a major dispute.

ing private employer drug testing issues. Direction from this Court is therefore needed to establish uniform legal principles in this area.

## II

BLE has virtually ignored the Ninth Circuit's second holding—its conclusion that Fourth Amendment principles govern the interpretation of private sector collective bargaining agreements. *See* App. at 11a. That holding alone would warrant review of this case, because it threatens to bar employer-instituted drug testing programs throughout the private sector. As the Equal Employment Advisory Council cogently explains in its brief *amicus curiae*, the impact of this Fourth Amendment theory "could interfere directly with important, ongoing substance abuse testing programs not only as to railroads and airlines, but throughout American industry, both in organized and unorganized workplaces." [8] That far-reaching impact demands prompt correction by this Court.

## III

BLE's attempt to cast this case as presenting "a relatively simple labor issue," *see* Opp. Cert. at 28, vastly understates the effect of relegating drug testing programs to the RLA's major dispute resolution procedures. Unlike employers governed by the National Labor Relations Act, rail and airline carriers are required to undertake protracted and purposefully drawn out procedures before implementing proposed programs. *Brotherhood of Railway & Steamship Clerks v. Florida East Coast Railway*, 384 U.S. 238, 246 (1966). Moreover, it is far from clear that any effort to protect the public safety through RLA negotiations on reasonable employee drug testing programs would ever succeed.

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[8] Brief Amicus Curiae of the Equal Employment Advisory Council in Support of the Petition for a Writ of Certiorari (filed May 2, 1988) at vii.

BN is not alone in facing arguments that the RLA poses a significant barrier to addressing the problem of employee drug abuse. Conrail, Norfolk & Western Railway, Chicago & North Western Transportation Company, and Southern Pacific Transportation Company have all been subject to litigation challenging their drug and alcohol testing programs.[9] The breadth of the rail industry's support for permitting carriers to implement reasonable employee drug testing programs without RLA negotiations is demonstrated by the appearance as *amicus curiae* of the National Railway Labor Conference, an organization that represents ninety percent of the industry.[10] The Nation's air carriers have also appeared here to emphasize the importance of not burdening drug testing programs with RLA major dispute procedures.[11] Indeed, three members of that industry—Southwest Airlines, Trans World Airlines, and Alaska Airlines—have already faced RLA challenges to their testing programs.[12] The persistence and vigor with which both rail and air

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[9] *Railway Labor Executives' Association v. Consolidated Rail Corp.*, No. 87-1289 (3d Cir. April 25, 1988); *Railway Labor Executives Association v. Norfolk & Western Railway*, 833 F.2d 700 (7th Cir. 1987); *Brotherhood of Maintenance of Way Employees v. Chicago & North Western Transportation Co.*, 827 F.2d 330 (8th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3682 (1988); *International Association of Machinists & Aerospace Workers, Lodge 19 v. Southern Pacific Transportation Co.*, 105 L.R.R.M. (BNA) 2046 (E.D. Cal. 1980).

[10] Brief for the National Railway Labor Conference as Amicus Curiae in Support of the Petition (filed April 29, 1988).

[11] Brief of the Airline Industrial Relations Conference and the Air Transport Association of America as Amici Curiae Supporting Certiorari (filed April 29, 1988).

[12] *See International Brotherhood of Teamsters, Local 19 v. Southwest Airlines*, No. 87-1085 (5th Cir. Apr. 27, 1988); *International Association of Machinists & Aerospace Workers v. Trans World Airlines*, 663 F. Supp. 230 (D.D.C. 1987); *Airline Pilots Association International v. Alaska Airlines*, No. C87-353R (W.D. Wash. Aug. 11, 1987), *appeal docketed*, No. 87-4167 (9th Cir. Sept. 9, 1987).

carriers have pursued safety-oriented drug testing confirms the importance of the issue to those industries.

These carriers have taken the position that their collective bargaining agreements permit—and public safety concerns compel—effective measures against employee drug abuse without interminable, possibly fruitless discussions and without compromising effective programs to obtain employee concurrence. While BLE touts union-approved programs as an alternative,[13] they plainly do not offer such an easy solution. BN supports the use of employee assistance programs as a correlative of drug use testing—and has made such a program available to its employees.[14] However, the limited effectiveness of such programs is demonstrated by one simple fact: as of the time this case went to trial, only *one* BLE member had volunteered for participation in BN's current peer referral program.[15] As recent events demonstrate, a railroad employee whose drug impairment causes an accident is the least likely person to come forward voluntarily for rehabilitation.[16] Thus, exclusive reliance on peer referral

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[13] BLE focuses on CSX Transportation, *see* Opp. Cert. at 2, 29, which has determined for its own business reasons to obtain union approval before implementing a drug testing program. However, that carrier is plainly an exception to rail and airline industry practice. The same is true of the other voluntary carrier effort BLE commends, the more limited program known as "Operation Red Block" adopted by Union Pacific Railroad.

[14] BN's employee assistance program now includes peer referral, counseling and rehabilitation, as well as a by-pass provision under which disciplinary consequences for Rule G violations can be deferred. *See* App. at 86a. These provisions were initiated following informal discussions with employee organizations.

[15] App. at 84a. Indeed, even if members of all employee organizations are considered, only *eight* persons had volunteered for the current program. *Id.*

[16] In recent hearings, Congress was told: "I have never known anybody to turn themselves in" by Ricky L. Gates, the Conrail engineer who was involved in the fatal January 4, 1987 Amtrak-

and bypass programs, without a testing component, are not only ineffective but also deprive the industry of information needed to understand and address the cause of rail accidents.

BLE would have this Court believe that drug testing of transportation employees is an issue reasonable parties could readily resolve in the course of brief discussion or negotiation. That assertion is belied by the volume of litigation on this important topic and the conflicting results it has engendered in the absence of guidance from this Court. More important, BLE suggests that the employee drug use problem in the rail industry is not of sufficient magnitude to be of concern to the public or this Court, but should be left to the vagaries of the bargaining process. The Court should reject this contention and provide the lower courts and the industry with guidelines to assure that the public interest is not extinguished in the labor relations process.

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Conrail collision. Developments in Drug and Alcohol Testing, 1988: Stenographic Transcript of Hearings on S. 1041 Before the Comm. on Commerce, Science and Transportation, 100th Cong., 2d Sess. at 100 (1988) (statement of Ricky L. Gates); *see also 24 Injured as Train Derails South of Philadelphia; Safety Board to Question Amtrak Switch Operator Who Fled Crash Site in Northeast Corridor*, Washington Post, Jan. 30, 1988, at A3.

## CONCLUSION

For all of these reasons and for the reasons stated in the Petition, the Petition for Certiorari should be granted.

Respectfully submitted,

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